

Guo (Migration) [2022] AATA 4172 (10 October 2022)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Zhiwu Guo
REPRESENTATIVE:	Ms Taya Hunt
CASE NUMBER:	2109950
HOME AFFAIRS REFERENCE(S):	BCC2020/2785026
MEMBER:	Andrew McLean Williams
DATE:	10 October 2022
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Employer Nomination (Permanent) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 186 - Employer Nomination Scheme visa: • Public Interest Criterion 4020 for the purposes of cl 186.213 of Schedule 2 to the Regulations

Statement made on 10 October 2022 at 1:24pm

CATCHWORDS

MIGRATION – Employer Nomination (Permanent) (Class EN) Visa – Subclass 186 – a bogus document was provided to the Department – employment reference letter – evidence provided to prove employment – decision under review remitted

LEGISLATION

Migration Act 1958, s 65
Migration Regulations 1994, Schedule 2, cl 186.213, Schedule 4 Public Interest Criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made on 20 July 2021 by a Delegate of the Minister for Home Affairs refusing to grant the Applicant an Employer Nomination (Permanent) visa, pursuant to s.65 of the *Migration Act 1958* (Cth) ('the Act').
5. The Applicant had applied for the visa on 9 December 2020. The Delegate refused to grant the visa on the basis of the Delegate concluding that the Applicant did not satisfy the requirements of clause 186.213 of Schedule 2 to the *Migration Regulations 1994* (Cth) ('the Regulations'), by reason that the Delegate formed the view that in the process of his applying for a Subclass 457 visa - as had been conferred on the Applicant as the visa held by him in the 12 month period immediately prior to his current Subclass 186 visa application - the Applicant had provided false information and/or a 'bogus document', in the form of an employment reference letter dated 6 September 2016 claiming that the Applicant had been employed at the Chongqing Hengdu Foodstuff Development Company since March 2011.
6. Employment checks conducted by telephone with the Chongqing Hengdu Foodstuff Development Company by the Department's overseas post in China on 26 April 2021 had given rise to concerns about the provenance of the employment reference letter, and the Delegate concluded that it was a bogus document, or otherwise contained information that was false and misleading in a material aspect, such that the Applicant did not satisfy the requirements of Public Interest Criteria 4020.
7. The Applicant appeared before the Tribunal on 25 August 2022. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The Applicant was represented in relation to the Tribunal review by Ms Taya Hunt from Minter Ellison Lawyers. Ms Hunt also attended the Tribunal hearing on 25 August 2022 and had provided detailed written submissions (those dated 18 August 2022), prior to the date of the hearing.
8. For the following reasons, the Tribunal has concluded that the matter should now be remitted to the Department, for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa Applicant meets Public Interest Criterion 4020 ('PIC 4020') as required by cl.186.213 for the grant of the visa.
10. Broadly speaking, this requires that:
 - there be no evidence that the Applicant has given, or caused to be given, to the Minister, an Officer, the Tribunal, a relevant Assessing Authority, or Medical Officer of the Commonwealth, a 'bogus document' or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the Applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the Applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the Applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the Applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the Applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the Applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the Applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

12. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
13. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies irrespective whether the Minister actually became aware of the bogus document or information that is false or misleading in a material particular because of information given by the Applicant: PIC 4020(3). It also applies irrespective whether the document or information was provided by the Applicant knowingly, or unwittingly.
14. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the Applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
15. In this case issues arise regarding the provenance of an employment reference letter that states that the Applicant had worked at the Chongqing Hengdu Foodstuff Development Company in China as a boner since March 2011 until the date of the employment reference letter.
16. On 26 April 2021 an officer attached to the Department's overseas post in China had attempted to contact the Chongqing Hengdu Foodstuff Development Company by telephone, initially unsuccessfully. Eventually, the departmental officer managed to contact a Mr Li Zhongming, who was able to recall the Applicant and to recall his signing the employment letter, however Mr Li also informed the Departmental Officer on the telephone that the Applicant had only worked for that company 'for a few months' rather than for a number of years commencing in March 2011 as was indicated in the employment reference letter. When the Departmental Officer pointed out to Mr Li that the reference letter indicated the Applicant had been a long-term employee rather than only a short term one, Mr Li indicated that he had a 'poor memory' and requested that the Departmental Officer call back on another occasion. When the Departmental Officer re-telephoned the Chongqing Hengdu Foodstuff Development Company 15 minutes later, the call was answered by another person, a Mrs Huang, who was then only able to repeat verbatim the information already contained in the employment reference letter that the Departmental Officer was seeking to

enquire about, and was unable to provide any other information, or documents, in further confirmation of the Applicant's prior employment at the Chongqing Hengdu Foodstuff Development Company.

17. The Delegate formed a preliminary view that the employment reference letter from the Chongqing Hengdu Foodstuff Development Company was suspicious, and may be false or misleading in a material particular, so wrote to the Applicant on 17 June 2021 inviting the Applicant to now comment, in writing, in relation to that preliminary view.
18. On 15 July 2021 the Applicant responded, providing a statutory declaration from himself as well as other evidence in further proof of the genuineness of the employment reference letter from the Chongqing Hengdu Foodstuff Development Company ('further evidence').
19. However, the Delegate was unaccepting of that further evidence, and concluded that the employment reference letter was false and misleading in a material particular, namely the length of time that the Applicant had worked as a boner at the Chongqing Hengdu Foodstuff Development Company.
20. On the hearing of this Application for Review the Applicant relies upon the *same* evidence as had been submitted previously to the Department as the further evidence given by the Applicant in response to the natural justice invitation extended by the Department on 17 June 2021.
21. The Applicant submits that the Delegate had fallen into error for having failed to attach sufficient weight to that further evidence, and had unreasonably drawn adverse inferences from the confused oral responses given by employees of the Chongqing Hengdu Foodstuff Development Company in China at the time when they were 'cold called' several years later by a representative from the Department at the Australian offshore post.
22. The further evidence submitted by the Applicant to the Department in response to the natural justice invitation extended to the Applicant on 17 June 2021 included the following:
 - A declaration by a Mr Zhen Li, Team Leader at Chongqing Hengdu Foodstuff Development Company in China. Mr Li declares having worked with the Applicant from 2012 until 2016, and having been the Applicant's team leader from 2013 onwards;
 - A declaration from the Applicant made on 14 July 2021 in which the Applicant declares that he did work for the Chongqing Hengdu Foodstuff Development Company from March 2011 and December 2016 and had received the employment reference letter now under scrutiny at the time of his leaving the employ of that Company.
 - The Applicant's annual health certificates, as obtained by him from the Health Inspection Office of the Fengdu Health Bureau in each of 2013, 2014 and 2015 which were necessary for him to be able to continue working at the Chongqing Hengdu Foodstuff Development Company. The health certificates themselves indicate that the Applicant was medically assessed as an employee of the Hengdu Foodstuff Development Company Limited.
23. In the Tribunal's view, the additional information provided by the Applicant in response to the Department's natural justice invitation of 17 June 2021 (as now specified immediately above) was entirely sufficient - in and of itself - to allay any preliminary concerns regarding the provenance of the original employment letter furnished by the Applicant from the Chongqing Hengdu Foodstuff Development Company in confirmation of his prior employment.

24. It is hardly surprising that officers at the Chongqing Hengdu Foodstuff Development Company who were cold-called several years later by an officer working for the Australian government were unable to remember the employment details of the Applicant in granular detail; and nor is it surprising - given differences in employment standards between Australia and China - that the Chongqing Hengdu Foodstuff Development Company have not kept detailed employment documents pertaining to the Applicant.
25. Therefore, the Applicant **meets** PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

26. PIC 4020(2) requires the Tribunal to be satisfied that the Applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
27. There is no evidence before the Tribunal suggesting that the Applicant and each member of the family unit have been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa was initially refused.
28. Therefore, PIC 4020(2) is met.

Has the Applicant satisfied the identity requirements?

29. PIC 4020(2A) requires an Applicant satisfy the Tribunal as to his or her identity. The Tribunal has examined the biodata information from the Applicant's Chinese passport and is now satisfied as to his identity.
30. Therefore, the Applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

31. PIC 4020(2B) requires that neither the Applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
32. There is no information before the Tribunal to suggest that the Applicant nor any member of his family unit have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa was originally.
33. Therefore PIC 4020(2B) **is met**.
34. On the basis of the above, the applicant **does** satisfy PIC 4020 for the purposes of cl 186.213.

DECISION

35. The Tribunal remits the application for an Employer Nomination (Permanent) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 186 - Employer Nomination Scheme visa:

- Public Interest Criterion 4020 for the purposes of cl 186.213 of Schedule 2 to the Regulations

Andrew McLean Williams
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...